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United States Bankruptcy Court
San Jose, California

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re]	Case No. 11-55157-ASW
AMERICAN G.I. FORUM,]	Chapter 11
Debtor.]	

MEMORANDUM DECISION DENYING MOTION FOR SUMMARY JUDGMENT

Debtor in Possession American G.I. Forum (hereafter the "Forum") moves for an order granting summary judgment in favor of the Forum and disallowing the claim of creditor Abel Cota (hereafter "Cota") on the grounds that Cota perpetuated a fraud upon the Court which precludes the granting of any relief to Cota pursuant to Fed. R. Civ. P. 60 and 11 U.S.C. § 105. Cota has filed a creditor's claim against the Forum in the current bankruptcy in the amount of \$197,500.00 arising from the alleged failure of the Forum to pay Cota back-pay for the time that Cota served as the Executive Director of the Forum. The Forum was engaged in a prior Chapter 11 bankruptcy proceeding, Case Number 06-51497-MM, where the alleged debt owed to Cota was neither scheduled nor claimed, and Cota allegedly paid himself for pre- and post-petition debt

1 during the pendency of that case. Cota opposes the motion, and the
2 Forum has replied. Special counsel Eugene Flemate and attorney
3 Charles Greene represent the Forum. Attorney J. Joseph Wall, Jr.
4 represents Cota.

5 In filing for summary judgment, the Forum represented that the
6 Forum did not need to conduct any discovery and that the Court
7 should decide the allowability of Cota's claim on the papers. The
8 Court has considered the parties' written arguments, evidence, and
9 statements made at the hearing on March 30, 2013. For the reasons
10 explained below, the Forum did not establish that Cota's claim
11 should be disallowed.¹ Therefore, the Forum's Motion for Summary
12 Judgment is denied.

13
14 **I. Procedural History**

15 The Forum filed the instant Chapter 11 proceeding on March 30,
16 2011. Cota filed a proof of claim on December 15, 2011, over two
17 months past the deadline of October 4, 2011. The Forum filed an
18 objection to the claim based solely on timeliness. The Court
19 overruled that objection for Cota's excusable neglect under Fed. R.
20 Bankr. P. 9006(b)(1), for reasons listed infra.

21 Cota then filed a Motion for Relief from Stay and sought an
22 Order of Abstention on September 20, 2012, seeking to lift the stay
23 to pursue a state court action against the Forum. Cota originally
24 set the Motion for hearing on November 14, 2012, but notice was
25 defective. The Motion was then re-set for hearing on January 18,

26
27 ¹ Although the effect of this decision is to allow Cota to
28 assert a claim, the claim remains unliquidated and disputed.
Therefore, the Forum retains the right to challenge the amount of
the claim.

1 2013. The Forum did not file a written opposition. At the January
2 18, 2013 hearing, the Forum's counsel appeared and expressed an
3 intent to oppose the Motion orally. The Court informed the Forum's
4 counsel that, in fairness to the other side, a written opposition
5 was required, and the Court continued the matter. Per the Forum's
6 counsel's agreed upon schedule, the Forum's counsel was to file the
7 opposition by February 4, 2013, with Cota's reply, if any, due by
8 February 12. The Forum did not file an opposition until February
9 11, but Cota still replied on the 12th -- arguing that the Court
10 should strike the the Forum's opposition due to untimeliness. The
11 Court issued an order continuing the matter to March 1, 2013, and
12 giving Cota until February 25, 2013 to supplement his reply to the
13 Forum's opposition on the merits.

14 At the relief from stay hearing on March 1, 2013, the Court
15 was prepared to rule on Cota's Motion, however, the Forum proposed
16 to file this Motion for Summary Judgment before the Court gave its
17 ruling on the Motion for Relief from Stay. The Forum opposed
18 returning to state court on the basis that the bankruptcy court was
19 the more appropriate forum for a determination of Cota's claim, and
20 indicated that the matter could be decided within the summary
21 judgment context. The Court and the parties agreed that the single
22 dispositive issue at hand was whether, as a matter of law, Cota was
23 precluded from filing a claim in the Forum's current bankruptcy
24 case due to Cota's actions in the Forum's prior bankruptcy. The
25 Court asked if discovery was necessary, and the Forum's counsel
26 indicated that no discovery was necessary, explaining that if the
27 Forum were to admit one fact arguendo, only for the purposes of
28 summary judgment, there would be no other material facts in

1 dispute. This single fact is that the Forum, as the Debtor in the
2 prior bankruptcy, knew and colluded with Cota to defraud the
3 bankruptcy court in the prior Chapter 11 case by hiding the alleged
4 debt owed to Cota from the Court.

5
6 **II. Standard of Review**

7 A court shall grant summary judgment if the pleadings and any
8 filed affidavits, discovery responses and deposition testimony show
9 that there is no genuine issue as to any material fact and that the
10 moving party is entitled to a judgment as a matter of law. Fed. R.
11 Bankr. P. 7056 (incorporating Fed. R. Civ. P. 56); Matsushita Elec.
12 Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 584-85
13 (1986). Material facts are those that may affect the outcome of
14 the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
15 (1986). A dispute as to a material fact is genuine if there is
16 sufficient evidence for a reasonable jury to return a verdict for
17 the non-moving party. Id. When determining whether such a factual
18 dispute exists, the Court may not weigh the evidence or make
19 credibility determinations. Id. at 255; see also Bravo v. City of
20 Santa Maria, 665 F.3d 1076, 1083 (9th Cir. 2011). Instead, "[t]he
21 evidence of the non-movant is to be believed, and all justifiable
22 inferences are to be drawn in [the non-movant's] favor." Anderson,
23 477 U.S. at 255 (citing to Adickes v. S.H. Kress & Co., 398 U.S.
24 144, 158-59 (1970)). If a genuine dispute as to a material fact
25 exists, then summary judgment must be denied. Anderson, 477 U.S.
26 at 249-50.

1 **III. Statement of Material Facts**

2 The following facts are taken from the parties' respective
3 declarations and exhibits, and from the record. Consistent with
4 Fed. R. Civ. P. 56, the Court has construed all facts in a light
5 most favorable to the non-moving party, Cota.

6
7 **A. Declaration of Robert Guerra**

8 The following facts are taken from the declaration of Robert
9 Guerra, filed in support of Cota's opposition to the motion for
10 summary judgment.

11 Robert Guerra was the former Chairman of the Board of the
12 Forum from 2000-2007, and in July of 1999, the Forum hired Cota,
13 via a written agreement, to serve as its Executive Director for a
14 period of five years at a yearly salary of \$65,000.00. Guerra
15 Decl., ¶ 1. The written agreement also provided Cota the "option
16 of contract renewal at the end of this five year contract upon the
17 same or upon mutually agreed terms." Guerra Decl., ¶ 1.

18 The Forum ran into financial difficulties during that five
19 year period but made partial payments to Cota throughout the
20 contractual period. Guerra Decl., ¶ 2. The Forum promised to pay
21 Cota his full salary once the Forum was in a financial position to
22 do so. Guerra Decl., ¶ 2. While Mr. Guerra served as Chairman of
23 the Board, the Forum orally renewed Cota's contract on a yearly
24 basis pursuant to the same terms and conditions as set forth in the
25 written agreement. Guerra Decl., ¶ 2. The Forum agreed to employ
26 Cota as a consultant performing the services of Executive Director
27 at an annual salary of \$65,000.00. Guerra Decl., ¶ 2. This option
28 was approved by the Board and the Membership, and Cota agreed to

1 provide services for the Forum and defer his payments until after
2 Cota retired. Guerra Decl., ¶ 2.

3 In August 2006, the Forum filed for bankruptcy. Guerra Decl.,
4 ¶ 3. Sidney Flores was the Forum's attorney at the time, and Mr.
5 Flores had Robert Guerra appointed as the Responsible Individual
6 representing the Forum in that bankruptcy. Guerra Decl., ¶ 3. Mr.
7 Flores knew of the Forum's financial arrangement with Cota because
8 Mr. Guerra and Mr. Flores had spoken about the arrangement. Guerra
9 Decl., ¶ 3. According to Mr. Guerra, it was always understood
10 that, despite the Forum's lack of cash flow, Cota would continue to
11 provide services for the Forum and the Forum would make partial
12 payments to Cota until the Forum was in a financial position to pay
13 Cota his full salary and money past due or, at the latest, it was
14 agreed that the Forum would pay Cota the full amount after Cota
15 retired. Guerra Decl., ¶ 3.

16 Mr. Guerra was the Forum's representative during the first
17 bankruptcy case and he served as the designated Responsible
18 Individual when Charles Greene succeeded Mr. Flores as the Forum's
19 lawyer. Guerra Decl., ¶ 4. Mr. Guerra continued to serve in that
20 capacity as the designated Responsible Individual until the Chapter
21 11 proceedings were dismissed on May 9, 2007.² Guerra Decl., ¶ 4.

22 In June 2007, Mr. Guerra renewed Cota's option to serve as the
23 Executive Director of the Forum for another year on the same terms
24 and conditions as the previous years. Guerra Decl., ¶ 5. Again,
25 Cota agreed to continue to provide services for the Forum and defer
26 payments until after Cota retired. Guerra Decl., ¶ 5.

27
28 ² The Court's electronic case file confirms that the prior
case was dismissed on May 9, 2007.

1 Mr. Guerra served as Chairman of the Board until Mr. Guerra
2 left the Board in or around May of 2008. Guerra Decl., ¶ 6. At no
3 time from March 1999 through June 2008 was Cota terminated from the
4 Forum or relieved of his duties as Executive Director of the Forum.
5 Guerra Decl., ¶ 6.

6
7 **B. Declaration of Abel Cota**

8 Cota filed a declaration in the Santa Clara County Superior
9 Court which duplicates nearly all of the facts stated in Mr.
10 Guerra's declaration. This declaration was submitted by the Forum
11 in support of summary judgment.

12 Cota's declaration confirms that Cota served as the Executive
13 Director of the Forum under a written agreement for a five-year
14 period at a yearly salary of \$65,000. Cota Decl., ¶ 1. When the
15 Forum ran into financial difficulties, the Forum became unable to
16 pay all of Cota's salary. Cota Decl., ¶ 2. The Forum made partial
17 payments to Cota throughout the contractual period and promised to
18 pay Cota's full salary when the Forum was in a financial position
19 to do so. Cota Decl., ¶ 2. At the end of the five-year period,
20 Cota's contract was extended orally through the Board of Directors
21 and its chairmen, David Rodriguez then Mr. Guerra. Cota Decl., ¶
22 2. The extension was on the same terms and conditions as the
23 written contract. Cota Decl., ¶ 2. The contract was renewed
24 yearly until Cota retired in 2008. Cota Decl., ¶ 2. Cota's
25 employment was not terminated. Cota Decl., ¶ 3.

26 Cota performed his duties openly and publicly and interacted
27 with the Forum's staff, accountants, and lawyers. Cota Decl., ¶ 3.
28 Cota advised the Forum's attorney, Sidney Flores, that the Forum

1 owed Cota money, and Mr. Flores acknowledged to Cota that Mr.
2 Flores was aware of the financial arrangement between Cota and the
3 Forum. Cota Decl., ¶ 3. Mr. Flores admitted to Cota that the
4 Forum owed Cota money. Cota Decl., ¶ 3.

5 The Forum continued to make payments to Cota through June
6 2008, but the payments did not cover Cota's full salary. Cota
7 Decl., ¶ 4. Cota routinely submitted invoices to the Forum for
8 payment. Cota Decl., ¶ 4. According to Cota, there was always an
9 understanding and agreement that the Forum would pay Cota his full
10 salary for all of his services once the Forum was in a better
11 financial position. Cota Decl., ¶ 6.

12
13 **C. Declaration of Charles B. Greene**

14 In support of the instant motion, the Forum also filed a
15 declaration from attorney Charles B. Greene. The declaration was
16 prepared and filed in opposition to Cota's motion for relief from
17 stay and for abstention, but the declaration sets forth several
18 pertinent facts.

19 According to Mr. Greene, Mr. Greene was the Forum's attorney
20 in the previous bankruptcy case pending before Judge Morgan.
21 Greene Decl., ¶ 2. Mr. Greene stated that although the Responsible
22 Individual was Robert Guerra, Mr. Greene also dealt directly with
23 Cota. Greene Decl., ¶ 3. Mr. Greene stated that both Mr. Guerra
24 and Cota represented to Mr. Greene that the only debts which the
25 Forum had were those listed in an Exhibit A to a declaration signed
26 by Mr. Guerra. Greene Decl., ¶ 3. Mr. Greene stated that it was
27 based on this information that Mr. Greene filed a motion to
28 disburse funds in the previous bankruptcy case. Greene Decl., ¶ 3.

1 Mr. Greene's declaration states, in relevant part: "No one
2 ever mentioned to me that Abel Cota [was] not being paid as he now
3 contends in his current claim against [the Forum]. Neither was any
4 debt owing to Abel Cota ever listed in any schedule of debts
5 although Abel Cota always had the ability to list the debt if he
6 believed it really existed." Greene Decl., ¶ 4.

7 Mr. Greene's declaration then states that Mr. Greene moved to
8 dismiss the previous bankruptcy case because there was no longer
9 any reason for the bankruptcy. Greene Decl., ¶ 5. Mr. Greene
10 states: "Specifically, I had been told by Abel Cota and everyone
11 else that I dealt with that was related to [the Forum] that all of
12 the pre-petition and post-petition creditors had been paid."
13 Greene Decl., ¶ 5. Believing that all such debts had been paid,
14 Mr. Greene then filed a declaration in support of dismissal of the
15 previous case making the following representation on behalf of the
16 Forum: "the Movant has sold one of its principal assets, and with
17 the funds obtained from the sale, paid off, in full, all pre-
18 petition creditors of the estate, as well as paying all outstanding
19 post-petition debt." Greene Decl., ¶ 5 (emphasis in original).
20 The case was then dismissed. Greene Decl., ¶ 6.

21
22 **D. Second Declaration of Robert Guerra**

23 Mr. Greene's declaration included a reference to a declaration
24 prepared and signed by Mr. Guerra in support of the motion to
25 disburse funds in the previous bankruptcy case. Generally, this
26 declaration from Mr. Guerra explained why the disbursement was
27 requested -- a piece of real property had been liquidated to pay
28 creditors. Guerra Decl., ¶¶ 4-8. Mr. Guerra stated that the

1 purpose of the disbursement was "to pay in full all of those pre-
2 petition and post petition creditors of [the Forum] who were not
3 otherwise paid" from sale proceeds from the sale of real property.
4 Guerra Decl., ¶ 7. Mr. Guerra then represented that Mr. Guerra had
5 reviewed the creditors' claims that were filed in the previous
6 bankruptcy case and had reviewed the Forum's accounts payable, and
7 prepared a list of all claimants and the approximate amount of each
8 claim. Guerra Decl., ¶ 8. Cota was not on the list which Mr.
9 Guerra prepared.

10
11 **E. Declaration of Sidney Flores**

12 Also in support of summary judgment, the Forum offered a
13 declaration from Sidney Flores which was prepared in opposition to
14 Cota's motion for relief from stay. Mr. Flores' declaration is
15 pertinent to the instant summary judgment motion in several
16 respects.

17 Mr. Flores' declaration explains that Mr. Flores was the
18 Forum's attorney in the previous bankruptcy case before another
19 attorney -- Charles Greene -- substituted into that case. Flores
20 Decl., ¶ 3. While working on the previous case, Mr. Flores dealt
21 directly with Cota even though Mr. Guerra was designated as the
22 Responsible Individual. Flores Decl., ¶ 3.

23 In the declaration, Mr. Flores denied any knowledge of the
24 financial arrangement between Cota and the Forum. Flores Decl., ¶
25 5. Mr. Flores also denied making any admission that the Forum owed
26 Cota money. Flores Decl., ¶ 5. Mr. Flores' direct denial of facts
27 attested to by Cota creates a factual dispute which the Court is
28 obliged to resolve in Cota's favor.

1 However, Mr. Flores admitted that Cota told Mr. Flores that
2 Cota believed that the Forum owed Cota money, and that some board
3 members had told Cota that the Forum would pay Cota when the Forum
4 had the money. Flores Decl., ¶ 6. Mr. Flores stated that Mr.
5 Flores told Cota that anyone who was owed money needed to file a
6 proof of claim, but Cota never did. Flores Decl., ¶ 6. Mr. Flores
7 did not know that Cota was paying himself for pre-petition debt and
8 instead believed that Cota was paying himself for current services.
9 Flores Decl., ¶ 8.

10
11 **F. Declaration of J. Joseph Wall**

12 The following facts are taken from the declaration of J.
13 Joseph Wall, Jr. -- attorney for Cota -- filed in support of Cota's
14 motion for relief from stay.

15 On January 21, 2010, Cota filed a lawsuit in Santa Clara
16 County Superior Court against the Forum for failure to pay
17 \$197,500.00 in wages. Wall Decl., ¶ 1. Multiple sets of written
18 discovery were propounded by the parties, and multiple depositions
19 were taken during the 17 months the case was prosecuted in Superior
20 Court. Wall Decl., ¶ 1. On December 6, 2010, Cota was awarded
21 \$92,040.00 against the Forum after evidence was presented at a non-
22 binding arbitration. Wall Decl., ¶ 1. The Forum rejected that
23 award and demanded a jury trial. Wall Decl., ¶ 1. On April 19,
24 2011, the Honorable Mark Pierce, a Santa Clara County Superior
25 Court Judge, denied the Forum's motion for summary judgment in that
26 court. Wall Decl., ¶ 1. Judge Pierce denied the motion because:
27 (1) the Forum failed to meet the Forum's burden to demonstrate that
28 Cota could not establish the existence of a contract; and (2) the

1 Forum's application of the statute of limitations as a defense did
2 not dispose of the entire cause of action. On May 27, 2011, the
3 case was assigned out to trial before the Honorable Brian Walsh.
4 Wall Decl., ¶ 1.

5 On May 30, 2011, on the eve of trial, the Forum filed for
6 Chapter 11 protection. Wall Decl., ¶ 1. On May 31, 2011, the
7 trial judge stayed the case as a result of the bankruptcy. Wall
8 Decl., ¶ 1. On April 5, 2012, at the status conference held in
9 Superior court, Judge Pierce stated to counsel that the case could
10 be set for trial within 90 days of its return from the bankruptcy
11 court. Wall Decl., ¶ 2.

12
13 **G. Other Facts**

14 From this Court's docket and previous hearings, the Court
15 takes judicial notice of the following facts concerning the instant
16 bankruptcy case.

17 The instant Chapter 11 was filed on May 30, 2011. The
18 deadline for filing a proof of claim was October 4, 2011, and Cota
19 filed a proof of claim on December 15, 2011. The Forum filed an
20 objection to the claim based solely on timeliness. On February 17,
21 2012, the Court overruled that objection for excusable neglect
22 under Fed. R. Bankr. P. 9006(b)(1); the written order overruling
23 the objection was signed on March 2, 2012, and docketed on March 5,
24 2012. (The Court's Order is Docket No. 51.) The Court reached
25 that decision based on the fact that the delay was short, the delay
26 had not impacted judicial proceedings in the case, and the Forum
27 had not yet filed a proposed Chapter 11 plan. The Court also found
28 a lack of prejudice to the Forum given that the Forum should not

1 have been surprised by the claim as it was scheduled, Cota's
2 attorney had raised the claim at the creditor's meeting, and the
3 Forum's attorney had indicated that a Chapter 11 plan would not be
4 filed until after resolution of the pending state court litigation
5 concerning the claim.

6 Counsel for the Forum filed a disclosure statement and Chapter
7 11 plan on March 23, 2012. The United States Trustee objected to
8 the disclosure statement on May 23, 2012. Cota filed objections on
9 May 25, 2012. After reviewing the disclosure statement and these
10 objections, on June 25, 2012, the Court issued comments regarding
11 the disclosure statement and Chapter 11 plan. The Court scheduled
12 a hearing for September 28, 2012 with an amended plan and
13 disclosure statement to be filed by August 24, 2012.

14 15 **IV. Discussion**

16 The Forum has provided no authority on point for the legal
17 principle the Forum asserts. That is to say, the Forum has not
18 cited to (and the Court has not found) a single authority that
19 stands for the proposition that a creditor is precluded from filing
20 a claim in a current bankruptcy case, because, during the pendency
21 of an unconfirmed previously dismissed bankruptcy, that creditor
22 "hid" the claim from the court and used the debtor's funds to pay
23 himself for pre- and post-petition debt.³

24
25 ³ Interestingly, whenever a case converts from one chapter to
26 another, there is a new order for relief, a new § 341 meeting is
27 held, and a new bar date is usually set for creditors to file
28 claims. See 11 U.S.C. § 348 (conversion constitutes an order for
relief); 11 U.S.C. § 341(a) (meeting of creditors convened within a
reasonable time after the order for relief); Fed. R. Bankr. P.
1019(2) (new filing period for claims in cases converted to Chapter
(continued...))

1 The Forum has raised four main arguments. First, the Forum
2 argues that Cota's failure to file a claim in the previous case
3 constituted a fraud on the court, therefore Cota should not be
4 allowed to assert a claim in the instant bankruptcy case. Second,
5 the Forum argues that Cota's payment to himself (using the Forum's
6 funds) for the Forum's pre-petition debt in the previous case
7 constituted a fraud on the Court, and the Court has the power to
8 avoid the transfers made to Cota in the prior bankruptcy. Third,
9 the Forum argues that the Federal Rules of Civil Procedure grant
10 powers to the Court to provide relief from a final judgment,
11 arguing that Cota's behavior amounted to fraud on the court, and
12 referencing several dissimilar situations which convinced courts to
13 do equity. Finally, the Forum argues that Bankruptcy Code section
14 105 grants broad powers to the Court to protect the integrity of
15 its proceedings. The Court will address each argument in turn as
16 well as other legal points not pleaded.

17
18
19

³(...continued)

20 7, except in reconverted Chapter 7); Fed. R. Bankr. P. 3003
21 (allowing the Court to set the time for filing claims in a Chapter
22 11 case). The parties have not cited to a single case in which a
23 creditor was precluded from filing a claim in the converted case
24 because the creditor had not filed a claim in the original case.

25 Logically, the filing of a new bankruptcy case after the
26 dismissal of an earlier case -- which also gives rise to a new
27 order for relief -- would have the same effect. See 11 U.S.C.
28 § 349(a) (dismissal of a case essentially restores the pre-petition
status quo); In re Dumontier, 389 B.R. 890, 897 (Bankr. D. Mont.
2008) (dismissal restores the pre-bankruptcy status quo; it is as
though the bankruptcy petition had never been filed); In re Income
Property Builders, Inc., 699 F.2d 963, 965 (9th Cir. 1982) ("After
an order of dismissal, the debtor's debts and property are subject
to the general laws, unaffected by bankruptcy concepts.").

1 **A. Cota's Failure to File a Claim in the Prior Bankruptcy**
2 **Case**

3 The Forum argues that Cota's failure to file a claim in the
4 first bankruptcy constituted a fraud on the court which precludes
5 Cota's current claim. However, unless Cota desired to be paid from
6 the prior bankruptcy estate, Cota was under no obligation to file a
7 claim in that prior case. Therefore, his failure to file a claim
cannot be said to be fraudulent.

8 The Forum argues that: (1) Cota was required under Fed. R.
9 Bankr. P. 3003(c)(2) to file a proof of claim in order to
10 participate in any distribution from the estate; (2) as the Forum's
11 Executive Director, Cota knew all creditors were required to file a
12 claim; and (3) Cota knowingly misled the Court when Cota did not
13 file a claim, and the Forum did not list Cota as a creditor. While
14 it is correct that in the Forum's prior bankruptcy, Cota did not
15 file a claim and the Forum did not schedule the alleged debt, the
16 effect of this inaction would have been to preclude Cota from
17 taking part in the disbursement of the estate of the prior
18 bankruptcy.⁴ Cota's decision not to file a claim in the prior case
19 would not necessarily have had any effect in this, a subsequent
20 case.

21 In order to recover against a bankruptcy estate, creditors
22 typically must file proofs of claim. See Pioneer Inv. Services Co.
23 v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 383 (1993);
24 Fed. R. Bankr. P. 3003(c)(2). The Federal Rules of Bankruptcy
25 Procedure permit bankruptcy courts to establish bar dates by which
26

27 ⁴ However, the prior bankruptcy case never had a confirmed
28 plan and therefore there was never a disbursement.

1 proofs of claim must be filed or thereafter forfeited. Fed. R.
2 Bankr. P. 3003(c)(3); In re First Magnus Financial Corp., 415 B.R.
3 416, 421-22 (Bankr. D. Ariz. 2009).

4 A creditor who wishes to participate in the distribution of an
5 estate is required to file a proof of claim, and while that
6 participation can be denied by the disallowance of the claim, the
7 underlying claim continues to exist and has viability until it is
8 discharged. See Gaudio v. Stamford Color Photo, Inc. (In re
9 Stamford Color Photo, Inc.), 105 B.R. 204, 206 (Bankr. D. Conn.
10 1989) (citing Turner v. United States (In re G.S. Omni Corp.), 835
11 F.2d 1317, 1318-19 (10th Cir. 1987)); In re Wells, 227 B.R. 553,
12 560 (Bankr. M.D. Fla. 1998). Bankruptcy Rule 3003(c)(2), provides
13 that any creditor who fails to file a proof of claim shall not be
14 treated as a creditor. Failing to timely file a proof of claim
15 does not extinguish a creditor's status; it merely eliminates a
16 creditor's right to a distribution from an estate. Thus, even if
17 Cota failed to timely file a proof of claim and was not entitled to
18 a distribution in the first bankruptcy case, he would nonetheless
19 have a "right to payment," as defined by § 101(5)(A), upon
20 termination of the automatic stay under § 362(c) and upon dismissal
21 of the case, if his claim had not been discharged under
22 § 1141(d)(2). A creditor's claim remains viable until it is
23 discharged. Turner, 835 F.2d at 1318-19; In re Stamford Color
24 Photo, Inc., 105 B.R. at 206-07.

25 The claims bar date in the Forum's prior bankruptcy would have
26 been December 12, 2006; however, that bar date did not survive
27 dismissal of the prior bankruptcy. The preconfirmation dismissal
28

restored the status quo existing prepetition.⁵ 11 U.S.C. § 349; In re Dumontier, 389 B.R. at 897; In re Income Property Builders, Inc., 699 F.2d at 965. The filing of the new bankruptcy petition gave rise to a new order for relief and a new claims bar date. See note 3, supra. Because Cota's claim was not discharged in the prior bankruptcy, Cota was permitted to file a claim in the instant case, even though he did not file a claim in the earlier case.⁶

B. Avoidance of Transfers

The Forum also alleges that Cota, as the Forum's Executive Director, continued to pay himself during the pendency of the prior bankruptcy case for pre- and post-petition debt which Cota maintained was owed to him, and that the Court was never advised by either the Forum, its attorneys, or Cota about these pre- and post-petition payments or the claim. The Forum contends that Cota's conduct in this regard constituted a fraud on the Court which precludes Cota's claim in the instant bankruptcy case. The Forum has agreed, for the purposes of this motion, that the Forum knew and colluded with Cota in hiding this debt.

The Court first addresses the Forum's contention that the failure to disclose these payments -- or the existence of Cota's claim -- to the Court during the prior bankruptcy case amounted to fraud on the Court. For several reasons, the Court must reject this contention. The parties' evidence, construed in a light most

⁵ The Court will address the effect of the dismissal of the prior bankruptcy in the "The Power of the Court" discussion, infra.

⁶ Whether the amount of the claim should be reduced as a matter of equity is not an issue before the Court; the parties have not raised or briefed this question in any event.

1 favorable to Cota, shows that Cota did not conceal the payments or
2 Cota's claim from the Forum or the Forum's attorneys. Instead,
3 Cota made his financial arrangement with the Forum known to Mr.
4 Flores -- the attorney who preceded Mr. Greene in the previous
5 bankruptcy case. Ultimately, it was Mr. Greene who represented to
6 the Court, in the context of a motion to dismiss the case, that all
7 creditors had been paid.

8 Mr. Greene's representation was based upon a declaration from
9 Mr. Guerra, who was the Responsible Individual, and upon oral
10 statements by Mr. Guerra and Cota. According to Mr. Greene, Cota
11 had told Mr. Greene that all creditors had been paid. In some
12 respects, this was a true statement; all creditors who would
13 otherwise have been entitled to disbursement in the Chapter 11 case
14 had been paid. Construing the evidence favorably to Cota -- as
15 this Court must -- Mr. Greene could simply have misunderstood the
16 nature and scope of what Cota meant in representing that all
17 creditors had been paid. From this evidence, the Court cannot
18 conclude that Cota concealed information from Mr. Greene or
19 intentionally encouraged Mr. Greene to make a false statement to
20 the Court. Significantly, there is no evidence that Cota made any
21 direct representations to the Court which were untrue.

22 As for the avoidability of the payments made to Cota, the
23 Forum has cited no authority for this Court to take such action
24 within the context of this case. The Forum argues that bankruptcy
25 law gives a bankruptcy trustee, or a debtor in possession in a
26 Chapter 11, certain extraordinary powers to avoid transfers and
27 transactions that occurred before the bankruptcy filing. The Forum
28 argues that 11 U.S.C. §§ 547, 548, and 549 should allow the Court

1 to avoid the transfers Cota paid himself leading up to and through
2 the pendency of the prior bankruptcy. The Forum also argues that a
3 preference can be voided because it is not fair to the other
4 creditors. However, these powers to avoid the transfers to Cota
5 arose in -- and disappeared upon the dismissal of -- the prior
6 bankruptcy case.⁷ The Forum has not moved to reopen the prior case
7 to avoid these, or any other, transfers.⁸

8 9 C. Relief from Judgment

10 The Forum argues that Fed. R. Civ. P. 60⁹ grants the Court the
11 authority to provide relief from any final judgment, order, or
12 proceeding for several grounds. Fed. R. Civ. P. 60(b) states in
13 relevant part:

14 (b) Grounds for Relief from a Final Judgment,
15 Order, or Proceeding. On motion and just
16 terms, the court may relieve a party or its
17 legal representative from a final judgment,
18 order, or proceeding for the following reasons:

19 ...

20 (3) fraud (whether previously called
21 intrinsic or extrinsic),
22

23 ⁷ If the Forum paid Cota for pre-petition debt during the
24 pendency of the prior bankruptcy case, and if there had been a
25 confirmed Chapter 11 plan in that case, it is conceivable that the
26 United States Trustee or a creditor might have had a cause of
27 action to recover those pre-petition payments. However, because no
28 Chapter 11 plan was ever confirmed in the prior case, such claims,
if any, are likely moot due to the dismissal of the prior case.
See note 3, supra, discussing the effect of dismissal.

⁸ Neither the Forum nor anyone else has moved to reopen the
prior bankruptcy case for this purpose at this juncture. However,
it is clear that a motion to avoid the transfers is inappropriate
in the case at bar.

⁹ With limited exceptions not applicable in this case, Fed. R.
Bankr. P. 9024 incorporates Fed. R. Civ. P. 60.

misrepresentation, or misconduct by
an opposing party;

...

(6) any other reason that justifies
relief.

(c) Timing and Effect of the Motion.

(1) Timing. A motion under rule 60(b)
must be made within a reasonable time
- and for reasons (1), (2), and (3) no
more than a year after the entry of
the judgment or order or the date of
the proceeding.

The Forum cites no specific final judgment, order, or
proceeding that the Forum wants the Court to set aside. The only
order that relates to the Forum's argument was the order dismissing
the prior case, yet again the Forum has not moved to reopen and/or
vacate the dismissal of the prior case.

If the Court assumes that the motion is appropriately made in
the case at bar, the Court could not grant the relief sought under
Rule 60(b). The prior Chapter 11 was dismissed in 2007, and the
motion is well past the one-year deadline for filing motions under
Rule 60(b)(3). While subsection (b)(6) is not limited to the same
one-year deadline as subsection (b)(3), the motion must still be
made within a reasonable time. Here, five years have passed from
the dismissal, and the Forum has not cited any reason for this
delay.¹⁰ Further, a party cannot use Rule 60(b)(6) to set aside an
order for grounds specifically set out elsewhere in Rule 60(b).
Hesling v. CSX Transp., Inc., 396 F.3d 632, 643 (5th Cir. 2005).

¹⁰ The Forum has also known the facts pertinent to the instant
motion since 2007 -- i.e., that Cota did not file a claim in the
prior bankruptcy case, that Cota was asserting a right to payment,
and that Cota had received some pre- and post-petition payments
relative to the prior bankruptcy petition.

1 In other words, a motion which argues that an order should be set
2 aside for fraud must be made under Rule 60(b)(3), and cannot be
3 made under Rule 60(b)(6). Therefore, the Forum's request to set
4 aside the dismissal order is untimely.

5 The Forum also argues that the Court should set aside "a
6 judgment" under Fed. R. Civ. P. 60(d). That Rule states, in
7 relevant part:

8 (d) Other Powers to Grant Relief. This rule
9 does not limit a court's power to

10 ...

11 (3) set aside a judgment for fraud on
12 the court.

13 No judgment was entered in the prior bankruptcy case which
14 could be set aside; there was only an order of voluntary dismissal,
15 without prejudice. However, even if this Court were to assume that
16 the order of dismissal could be set aside in the same manner as a
17 judgment under Rule 60(d), the Court cannot do so for two reasons:
18 (1) any such motion needed to be filed in the previous case, and
19 not in the case at bar; and (2) the Forum has not demonstrated that
20 Rule 60(d) is satisfied.

21 It is correct that there is no time limit on setting aside a
22 judgment for fraud on the Court, nor can laches bar consideration
23 of the matter, and it does not matter whether a party bringing the
24 fraud to the Court's attention has clean hands. However, fraud on
25 the court is a very exacting standard. Not all fraud is fraud upon
26 the Court.

27 The Ninth Circuit has adopted the following definition of
28 "fraud on the court":

"Fraud upon the court" ... embrace[s] only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.

Appling v. State Farm Mut. Auto. Ins. Co., 340 F.3d 769, 780 (9th Cir. 2003) (internal citations omitted). In Appling, the Ninth Circuit stated that "[f]raud on the court requires a 'grave miscarriage of justice' . . . aimed at the court." Id. (internal citation omitted.) To constitute fraud on the court, the alleged misconduct must harm "the integrity of the judicial process." Alexander v. Robertson, 882 F.2d 421, 424 (9th Cir. 1989).

Generally, non-disclosure by itself does not constitute fraud on the court, if there is no duty to disclose. See England v. Doyle, 281 F.2d 304, 310 (9th Cir. 1960). In England, before the commencement of an involuntary bankruptcy case by a creditor, the debtor transferred over \$74,000 in funds and property to the debtor's attorney. At some point prior to the adjudication of bankruptcy, the attorney reached a nonbinding stipulation with the creditor who had commenced the bankruptcy case, which was presented to the bankruptcy referee in support of a continuance.¹¹ Under the stipulation, the matter would be continued and the debtor's assets would be preserved. The attorney then filed an ex parte request for an order from the district court to allow the attorney to return the funds and property to the debtor. The district court granted the request, the attorney returned the funds and property to the debtor, and the debtor left the country. The bankruptcy trustee filed suit against the attorney, seeking to hold the

¹¹ The nature of the requested continuance is not clear.

1 attorney accountable. The trustee argued that the district court's
2 order allowing the attorney to return the funds and property to the
3 debtor was obtained by fraud upon the court, because the attorney
4 did not disclose the stipulation or the referee's non-final notice
5 of a decision to declare the debtor a bankrupt. Because the
6 stipulation was not binding and the referee's notice of decision
7 was not final, the Ninth Circuit concluded that there was no duty
8 on the part of the attorney to disclose either, and there was no
9 fraud upon the court. Id. at 309-10.

10 Similarly, perjury by a party or witness, by itself, is not
11 normally fraud on the court. See, e.g., Gleason v. Jandrucko, 860
12 F.2d 556, 559-60 (2d Cir. 1988); 12 James Wm. Moore & Joseph T.
13 McLaughlin, Moore's Federal Practice § 60.21[4][c], at 60-56-57 (3d
14 ed. 1998). The Gleason court reasoned that since perjury is an
15 evil that could and should be exposed at trial, it should not
16 qualify as fraud upon the court. See Gleason, 860 F.2d at 560.¹²

17 The burden is on the moving party to establish fraud by clear
18 and convincing evidence. Atchison, T. & S.F. Ry. Co. v. Barrett,
19 246 F.2d 846, 849 (9th Cir. 1957); England, 281 F.2d at 309-10.
20 Here, the Forum has not satisfied its burden to establish fraud
21 upon the Court by clear and convincing evidence. See Atchison, T.
22 & S.F. Ry. Co., 246 F.2d 846. Cota's failure to file a claim in
23 the prior bankruptcy case does not factor into the fraud analysis
24 at all, because Cota was not legally obligated to file one, as
25 discussed supra. The only apparent arguable wrongdoing is the
26 nondisclosure of facts pertinent to the dismissal by Cota -- a non-

27
28 ¹² In any event, the Forum has also not established that Cota
committed perjury or swore to any untrue statements.

1 party individual who was not the Forum's designated Responsible
2 Individual.

3 If the Forum and Cota had an agreement that the Forum would
4 pay Cota for back-pay as funds became available to the Forum, and
5 if the parties opted to treat that debt outside of bankruptcy,
6 there can be no showing of what the Court may or may not have done
7 having been apprised of that agreement. The Court might still have
8 dismissed the prior bankruptcy case in light of the fact that all
9 creditors who filed claims and would otherwise have been entitled
10 to disbursement under Chapter 11 had been paid in full. More
11 importantly, the Forum has offered no evidence that Cota made false
12 statements or hid information from the Forum's attorneys with any
13 intent that Mr. Greene would make a false representation to the
14 Court in seeking dismissal of the earlier case. There has been no
15 showing of any grave miscarriage of justice or any harm to the
16 judicial process.

17 The fact remains that for purposes of this motion, the Forum
18 was aware that Cota's debt was not satisfied at the time the Forum
19 moved for voluntary dismissal. However, because a party's non-
20 disclosure by itself usually does not constitute fraud on the
21 court, and Cota was not even a party to the prior bankruptcy, there
22 was no fraud on the court by Cota. See England, 281 F.2d at 304,
23 310.

24
25 **D. The Power of the Court**

26 The Forum has argued that this Court should disallow Cota's
27 claim based upon this Court's broad, equitable authority to protect
28

1 the integrity of its proceedings. For this proposition, the Forum
2 relies principally on 11 U.S.C. § 105.

3 Under § 105(a), "The court may issue any order, process, or
4 judgment that is necessary or appropriate to carry out the
5 provisions of this title." This statute does not confer upon the
6 Court a "roving commission to do equity." In re Saxman, 325 F.3d
7 1168, 1174-75 (9th Cir. 2003). Instead, the Court's equitable
8 authority is limited to carrying out the provisions of the
9 Bankruptcy Code. Id.; see also In re At Home Corp., 392 F.3d 1064,
10 1070 (9th Cir. 2004) (section 105(a) requires a bankruptcy court to
11 "locate its equitable authority in the Bankruptcy Code"). The
12 Court assumes, without deciding, that this equitable authority
13 extends to situations in which the integrity of proceedings before
14 the Court is under assault.

15 The Forum has not demonstrated that there has been any threat
16 to the integrity of any proceedings in this Court or in the prior
17 bankruptcy case. Construing the evidence most favorably to Cota,
18 the best the Forum's evidence shows is that Cota did not file a
19 claim in the previous bankruptcy and failed to correct Mr. Greene's
20 misconception that Cota lacked any right to payment. The Forum has
21 offered no evidence that Cota made any false representations to the
22 Bankruptcy Court which might have undermined the integrity of the
23 proceedings in the previous case. For this reason alone,
24 disallowance of Cota's claim under § 105 would not be proper.

25 Moreover, the Court has some concern about affording equitable
26 relief under § 105 in the context of a motion for summary judgment,
27 in which the moving party claims an entitlement to judgment as a
28 matter of law. Equitable determinations generally require a court

1 to balance and weigh a variety of equitable considerations, but in
2 the context of summary judgment, a court must construe all evidence
3 in a light most favorable to the non-moving party and is expressly
4 forbidden from weighing the evidence.¹³

5 Even assuming that the Court could make the equitable
6 determination the Forum seeks, the Court concludes that the Forum
7 has failed to demonstrate that such determination is appropriate.

8 The Forum cites In re An Unknown Group of Cases Seeking to be
9 Filed, 79 B.R. 651 (Bankr. E.D. Va. 1987) to support the principles
10 that a bankruptcy court is a court of equity and can do what needs
11 to be done under 11 U.S.C. § 105, as long as there is no abuse of
12 that power; and that bankruptcy is not a right, it is a privilege.
13 However, the facts of that case have no relation to the matter at
14 hand. In that case, the court ruled, pursuant to the bankruptcy
15 court's equitable powers, that large Chapter 7 cases of prospective
16 debtors which provided contract services of physicians to nursing
17 homes and hospital emergency rooms would not be accepted for filing
18 until the United States Trustee was satisfied that no threat to
19 public health existed. Id. at 653. There is no threat to public
20 health in the instant case.

21 Next, the Forum argues that the basic purpose of § 105 is to
22 enable the Court to do whatever is necessary to aid its
23 jurisdiction, i.e., anything arising in or relating to a bankruptcy
24 case. The Forum cites Allard v. Weitzman (In re Delorean Motor

25
26 ¹³ If the Court were to weigh the equitable considerations, the
27 Court would necessarily have to weigh the Forum's alleged
28 complicity in the misrepresentation made to the Bankruptcy Court
that all claims to creditors were paid in full, as well as any
potential unjust enrichment to the Forum if Cota's claim were
disallowed.

1 Co.), 991 F.2d 1236 (6th Cir. 1993), for this proposition. In that
2 case, the Chapter 7 trustee brought an adversary proceeding for
3 damages and injunctive relief based on a former fraudulent
4 transfer. While the Forum has not sought injunctive relief,
5 injunctive relief would appear to be the closest relief to
6 precluding Cota from filing a proof of claim. The Allard court
7 stated that § 105(a) "contemplates injunctive relief in precisely
8 those instances where parties are 'pursuing actions pending in
9 other courts that threaten the integrity of a bankrupt's estate.'" Id.
10 at 1242; see also Baptist Med. Ctr. of New York v. Singh (In re
11 Baptist Med. Ctr. of New York), 80 B.R. 637, 641 (Bankr. E.D.N.Y.
12 1987) (quoting Manville Corporation v. Equity Security Holders
13 Committee (In re Johns-Manville Corp.), 801 F.2d 60, 63 (2d Cir.
14 1986)). Again, as explained above, the Forum has not demonstrated
15 any threat to the integrity of the Forum's bankruptcy estate,
16 either in the instant case or in the former, dismissed, bankruptcy
17 case.

18 The Forum has also argued that Cota's claim should be denied
19 because Cota is culpable of contemptuous conduct. The Forum cites
20 to Fernos-Lopez v. U.S. Dist. Court for Dist. of Puerto Rico, 599
21 F.2d 1087 (1st Cir. 1979), for this proposition. In Fernos-Lopez,
22 the bankruptcy judge found the creditor to be in contempt for
23 refusing to obey orders to erase or relinquish a tape cassette
24 recording of proceedings at a creditors meeting made without the
25 court's permission. The creditor was fined \$250, but he refused to
26 pay the fine. These facts were certified by the bankruptcy judge
27 to the district court. After a jury trial, the creditor was found
28 guilty of contempt. He was given a three-month suspended sentence,

1 placed on probation for two years, fined \$2,000, and ordered to
2 reimburse the Government for all expenses incurred in the
3 proceeding. See Fernos-Lopez, 599 F.2d at 1089. The present case
4 is distinguishable. Here, Cota has not refused to obey an Order of
5 this Court, and Cota has not refused to pay a sanction levied upon
6 him. Therefore, there is no basis for denying Cota's claim on
7 these grounds.

8
9 **V. Conclusion**

10 The evidence submitted by the parties, viewed in a light most
11 favorable to Cota, does not demonstrate that Cota made any false
12 representation to the bankruptcy court in the Forum's previous
13 bankruptcy case such that Cota's claim should be disallowed in the
14 case at bar. On this issue, the Forum advised the Court that there
15 is no need for discovery and that the matter could be decided on
16 the papers. Therefore, the Forum's motion for summary judgment is
17 denied, and Cota's claim will not be disallowed.

18 **IT IS SO ORDERED.**

19 Dated:

20 9/26/13

21 
22 ARTHUR S. WEISSBRODT
23 UNITED STATES BANKRUPTCY JUDGE
24
25
26
27
28

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